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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KATHERINE CHRISTENSEN, Plaintiff/Appellant, v. CHEVY CHASE BANK, F.S.B., now CAPITAL ONE, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.; U.S. BANK, N.A.; and SPECIALIZED LOAN SERVICING, L.L.C., Defendants/Appellees.	2 CA-CV 2011-0113 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20090204

Honorable Peter J. Cahill, Judge

APPEAL DISMISSED

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V Á S Q U E Z, Presiding Judge.

¶1 Katherine Christensen appeals from the trial court's order denying her motion for leave to file a second amended complaint against Chevy Chase Bank, F.S.B., now Capital One, N.A., as successor by merger (Capital One); Mortgage Electronic Registration System, Inc. (MERS); Cal-Western Reconveyance Corporation (Cal-Western); U.S. Bank, N.A. (U.S. Bank); and Specialized Loan Servicing, L.L.C. (SLS), in connection with a loan obtained by Christensen and secured by a deed of trust on her property. Her complaint sought to invalidate a trustee's sale of the property based on "fraudulent documents" and breaches of the non-judicial foreclosure process. For the reasons stated below, we dismiss for lack of jurisdiction.

Factual Background and Procedural History

¶2 In August 2006, Christensen obtained a loan from First Magnus Financial Corporation (First Magnus), evidenced by an adjustable rate promissory note, and secured by a deed of trust on her property in Payson. The deed of trust listed First Magnus as the lender and MERS as "nominee for Lender and Lender's successors and assigns" and as beneficiary. The original trustee under the deed of trust was North American Title Company; however, MERS subsequently appointed Cal-Western as successor trustee. Shortly after the loan transaction, First Magnus transferred its interest in the promissory note to Capital One.

¶3 In October 2008, Christensen stopped making payments on the note.[1] Cal-Western then instituted non-judicial foreclosure proceedings against the property by recording a notice of trustee's sale. Shortly before the sale, Christensen initiated this action. She then filed for bankruptcy, triggering an automatic stay of the sale. After the bankruptcy court subsequently lifted the stay, Christensen filed an emergency motion asking the trial court for a temporary restraining order to halt the trustee's sale scheduled for April 7, 2010. However, the court vacated the hearing on the motion when Capital One reported that the sale had been cancelled. The trustee's sale of the property ultimately was held on May 10, 2010.

¶4 Christensen then filed a first amended complaint, which Capital One, MERS, U.S. Bank, and SLS moved to dismiss, arguing Christensen lacked standing and failed to state a claim upon which relief could be granted.[2] On February 9, 2011, the trial court granted Capital One's motion to dismiss the first amended complaint and granted Christensen leave to seek permission to file a second amended complaint within thirty days of the dismissal order. The court also vacated the temporary restraining order it had entered on July 27, 2010, prohibiting the defendants from interfering with Christensen's "possession, use and enjoyment" of the property. On April 25, 2011, the court denied

[1]Despite requesting a full accounting, Christensen has never denied that she defaulted on the note.

[2]Although Cal-Western filed a separate motion to dismiss, Christensen was not served in time for that motion to be addressed at the hearing on Capital One's motion.

Christensen's motion for leave to file a second amended complaint.[3] On May 19, 2011, the court entered judgment awarding Capital One, MERS, U.S. Bank, and SLS (collectively referred to as appellees) attorney fees and costs. The judgment included language in accordance with Rule 54(b), Ariz. R. Civ. P. This appeal followed.

Discussion

¶5 Christensen's amended notice of appeal states that she appeals from the trial court's "Minute Entry Order denying [her] Motion to Amend dated April 22, 2011 and filed in the Court Record on April 25, 2011."[4] It also states: "The appeal is against the dismissal of each and all defendants." Although she asserts that we have jurisdiction pursuant to A.R.S. § 12-2101, and appellees do not dispute this assertion, "this court has the duty to review its jurisdiction and, if jurisdiction is lacking, to dismiss the appeal." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991); *see also Kim v. Mansoori*, 214 Ariz. 457, ¶ 5, 153 P.3d 1086, 1088 (App. 2007) (appellate court may examine its jurisdiction sua sponte).

¶6 Our jurisdiction is limited by statute. *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 16, 977 P.2d 769, 774 (1999); *see also* A.R.S. § 12-2101(A). "The general rule is that an appeal lies only from a final judgment." *Davis*, 168 Ariz. at

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[3]In denying the motion, the trial court stated it was filed "tardy and the proposed amendment would be futile, Rule 15(a), [Ariz. R. Civ. P.]. Moreover, the proposed amendments relating to fraud are insufficiently pled. Finally, the claims in the proposed complaint relating to loan origination cannot be made against these defendants."

[4]Christensen's original notice of appeal states she is appealing from "the Judgment entered on April 25, 2011." This too is a clear reference to the court's order denying her motion to amend because the record reflects it is the only document filed that day.

304, 812 P.2d at 1122. A final judgment is one that "leav[es] no question open for judicial determination." *Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966). It must be in writing, signed by the appropriate judicial officer, and filed with the clerk of the court. *See* Ariz. R. Civ. P. 54(a), 58(a); *see also* Ariz. R. Civ. App. P. 2(d). "The denial of a motion to amend the complaint is not an appealable order until final judgment is ordered." *Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 402 n.2, 923 P.2d 863, 868 n.2 (App. 1996). When a complaint is dismissed and the plaintiff is granted leave to file an amended complaint, "another order of absolute dismissal after expiration of the time allowed for amendment [is] required to make a final disposition of the cause." *Callanan v. Sun Lakes Homeowners' Ass'n No. 1, Inc.*, 134 Ariz. 332, 335, 656 P.2d 621, 624 (App. 1982).

¶7 We recognize that "[w]hether an order is final and appealable depends not on its form but on its substance or effect." *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 14, 211 P.3d 16, 24 (App. 2009) (internal quotation omitted). However, this appeal presents a number of problems both with form and substance. The order dismissing the first amended complaint and the order denying the motion to amend both are unsigned and therefore are not appealable orders. *See* Ariz. R. Civ. P. 58(a); *see also* Ariz. R. Civ. App. P. 2(d); *Yaeger v. Vance*, 20 Ariz. App. 399, 400-01, 513 P.2d 688, 689-90 (1973) (order not appealable if not in writing, signed by judge, and filed).

¶8 And, even assuming that the order dismissing the first amended complaint had been signed, Christensen did not include it in her notice of appeal as an order she is challenging on appeal. Rule 8(c), Ariz. R. Civ. App. P., provides that the notice of appeal

"shall designate the judgment or part thereof appealed from." *See also Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 601, 694 P.2d 1213, 1215 (App. 1984). Her general statement that "[t]he appeal is against the dismissal of each and all defendants" does not meet this requirement. Moreover, the trial court declined to designate the dismissal order as being with or without prejudice. A dismissal without prejudice is not a final judgment and therefore generally is not appealable.[5] *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 4, 202 P.3d 536, 539 (App. 2009).

¶9 Although the May 19, 2011, judgment is signed, it relates only to attorney fees and costs. The inclusion of Rule 54(b) language in the judgment necessarily means that other issues or claims remain pending in the trial court. *See Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980) ("Rule 54(b) controls the finality of judgments when multiple claims are asserted or multiple parties are involved."). Notably, in granting "Capital One's Motion to Dismiss Plaintiff's First Amended Complaint," the court did not state that it also was dismissing the complaint against Cal-Western, which had filed a separate motion to dismiss. The judgment for fees and costs therefore does not constitute an "absolute dismissal [of the action] after expiration of the time allowed for amendment" that would permit Christensen to challenge the denial of

[5]Dismissal of an action without prejudice is appealable: (1) when the filing of another lawsuit is barred by the statute of limitations, *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 4, 202 P.3d 536, 539 (App. 2009); or (2) when the dismissal order "in effect determines the action and prevents judgment" from which an appeal might have been taken, A.R.S. § 12-2101(A)(3). Here, in addition to the orders being unsigned, there is nothing in the record to suggest the statute of limitations had expired, and the trial court granted Christensen leave to file a motion to amend the complaint after the first amended complaint was dismissed.

her motion to amend.[6] *Callanan*, 134 Ariz. at 335, 656 P.2d at 624; *see also* A.R.S. § 12-2102(A) (on appeal from final judgment, court has jurisdiction to consider interlocutory orders).

¶10 And, although the trial court entered final judgment with regard to attorney fees and costs, we lack jurisdiction to consider that issue as well. Christensen's notice of appeal contains no reference to the judgment awarding attorney fees and costs. She first raised the issue in her opening brief. "[O]ur review on appeal is limited to the rulings specified in the notice of appeal." *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, ¶ 38, 161 P.3d 1253, 1263 (App. 2007); *see also* Rule 8(c) (notice of appeal "shall designate the judgment or part thereof appealed from"). And, in any event, because Christensen did not object to the award of attorney fees below, the argument has been waived on appeal. *See Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990) ("As a general rule, we will not review an issue on appeal that was not argued or factually established in the trial court.").

Disposition

¶11 For the reasons stated above, we lack jurisdiction and the appeal is dismissed. Appellees have requested an award of attorney fees and costs on appeal

[6]*Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981), allows this court to exercise jurisdiction over "a premature appeal from a minute entry in which no appellee was prejudiced and in which a subsequent final judgment is entered." However, this exception is not applicable here because the trial court did not enter final judgment with regard to the dismissal of the claims. *See Snell v. McCarty*, 130 Ariz. 315, 317, 636 P.2d 93, 95 (1981) (Rule 54(b) determination necessary for final judgment of dismissal).

pursuant to A.R.S. § 12-341.01 and Rule 21, Ariz. R. Civ. App. P. In our discretion, we grant appellees' request contingent upon their compliance with Rule 21(a).

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge